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No. 89-948

In The
Supreme Court of the United States
October Term, 1989

HELEN ROBINSON,
Petitioner,

vs.

THE TOWNSHIP OF WATERFORD, OFFICER DONALD BAILEY, OFFICER TIMOTHY TARPENING, PETER DONLIN, and WALTER BEDELL,
Cross-Petitioners.

BRIEF IN OPPOSITION TO CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HATCHETT, DEWALT, HATCHETT & HALL
By: ELBERT L. HATCHETT
Attorneys for Petitioner
485 Orchard Lake Road
Pontiac, Michigan 48053
(313) 334-1587

ERNEST L. JARRETT, P.C.
By: ERNEST L. JARRETT
Attorneys for Petitioner
2515 Cadillac Tower
Detroit, Michigan 48226
(313) 964-2002

ROMAN PRINTING CORPORATION, 550 W. FORT STREET
DETROIT, MICHIGAN 48226 (313) 962-0744

TABLE OF AUTHORITIES

STATUES:

	Page
42 USC § 1983	1, 8, 13
MCLA 780.581	5, 12
MCLA 600.872	6, 12
MCLA 600.2907	9
DRC 790	6
GCR 789.2	7

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
TABLE OF CONTENTS	ii
STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
THE REASONS WHY CERTIORARI SHOULD NOT BE GRANTED:	
I. CERTIORARI SHOULD NOT BE GRANTED BECAUSE IT IS NOT INCONSISTENT WITH THE FACTS OF THIS CASE FOR PLAINTIFF (RESPONDENT) TO PREVAIL ON THIS CLAIM EVEN IF THE VERDICTS IN FAVOR OF THE DEFENDANT WERE LEFT UNDISTURBED	11
II. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE CROSS-PETITIONERS HAVE FAILED TO DEMONSTRATE A CONFLICT AMONG THE CIRCUITS ON THE ISSUE OF CONSPIRACY UNDER 42 US § 1983	13
CONCLUSION	14

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STATUTE INVOLVED

42 USC § 1983 provides:

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case arises out of a tragic series of events which began over the Memorial Day weekend in 1980 at the Sears Department store in the Pontiac Mall, located in the Township of Waterford, Oakland County, Michigan.

Cross-respondent's decedent, William Robinson, was a retired factory worker who suffered from Alzheimer's Disease, a degenerative condition which causes the brain to atrophy, and with its progression, robs its victim of most intellectual functions. Due to his condition, Mr. Robinson, was forgetful, unable to communicate in any meaningful manner, was incontinent of urine and bowel, was unable to clean himself and tended to frequently wander from home, despite efforts to restrict his movements by his family. As a result, he was extremely odoriferous, frequently seen chewing paper and other foreign objects and often mumbled to himself.

During those occasions that he wandered from home, Mr. Robinson frequently journeyed to the Pontiac Mall. His strong odor and peculiar behavior attracted attention from shoppers; and as a consequence, he was unpopular with mall shopkeepers.

Several times prior to the incident underlying this action, Waterford Township Police officers were called to the mall to remove Mr. Robinson from the premises. On those occasions the Township officers transported Mr. Robinson to his home, to the Pontiac Mission or Salvation Army shelter or on some occasions he was simply taken to the Waterford Township boundary and left outside of the Township limits. These practices, constitutionally questionable in and of themselves, made Mr. Robinson fairly well-known by officers of the Township Police Department, particularly Defendant Donald Bailey.

On Saturday, May 24, 1980, Mr. Robinson again wandered to the Sears Department store located on the mall premises. Defendant Bailey received a telephone call at the Township Police Station from Gregory Palmer, a Sears secu-

rity employee, advising that Mr. Robinson was again in the store. No activity or conduct attributed to Mr. Robinson was described during this conversation. Although no illegal activity had been described and Bailey himself had not observed Mr. Robinson commit any crime (indeed Bailey never saw Mr. Robinson on any occasion, but had only heard of him through other officers after their contacts with him as described above), Bailey, then a corporal, contacted Defendant Timothy Tarpening, a patrol officer, by radio and ordered that Mr. Robinson be arrested. There was no indication from Bailey during this communication as to the reason for Robinson's arrest.

Bailey later testified in this action, admitting that he was unaware of any law that Mr. Robinson had purportedly violated at the time he gave the order for the decedent's arrest. He further admitted that the sole reason the decedent's arrest was ordered was that with the holiday weekend in progress, he wanted the decedent "out of the eyes of the general public".

Consistent with this instruction, Defendant Tarpening arrived at the Sears store, located the decedent and placed him under arrest. In his report, prepared immediately after Robinson's arrest, Tarpening wrote:

> Investigation: I was dispatched to Sears to arrest William Robinson for loitering. WTPD has received numerous calls about the subject loitering at Sears, Hudsons and Pont. Mall in general. Mr. Robinson has been warned and transported home numerous times in the past. Subject was taken to O.C.J. and lodged. Due to his personal hygiene Robinson was not booked at this time. Robinson was arrested as he was wandering around in Sears. Disposition open advised by Cpl. Bailey to make arrest.

Tarpening would later testify in this matter offering at least three different and sharply conflicting accounts of his contact with Robinson at the store. However, none of these

accounts describe any activities or conduct attributable to Robinson which is evenly arguably illegal.

Mr. Robinson was charged with violation of Section 5.3 of Waterford Township Ordinance 87, entitled "Disorderly Conduct Ordinance". Section 5 of this ordinance states in its totality (including 5.3) the following:

> 5.0 **HARASSMENT**. A person commits the offense of harassment if, with intent to harass, annoy or alarm another person, he or she:
>
> 5.1 Strikes, shoves, kicks or otherwise touches a person or subjects him or her to physical contact.
>
> 5.2 Follows a person in or about a public place or places.
>
> 5.3 Engages in a course of conduct or repeatedly commits acts that alarm or seriously annoy another person, and which acts of conduct serve no legitimate purpose.
>
> 5.4 Contributes to the delinquency of a minor by any act, or by any word, shall contribute toward, cause or tend to cause any minor child under the age of seventeen (17) years to become delinquent or neglected so as to come under the Juvenile Division of the Probate Court, whether or not such child shall in fact be adjudicated a ward of the Probate Court. (Emphasis added).

The maximum penalty permitted by the ordinance was $500.00 fine and/or 90 days in jail.

After Robinson's arrest, the customary complaint, police report and other documents were forwarded to the 51st District Court and the City Attorney's Office to commence the prosecution. Defendant Bailey, however, admitted sending a note to the presiding judge in an admitted effort to influence the Judge's handling of the matter. The note read as follows:

> Judge
>
> This man has been a pain to our dept for the last week and a half (sic) We have given him rides to the city, just to get him out of the twp. If he plea's (sic)

guilty could you given him 90 days.

Thanks

Cpl Bailey

Bailey would testify, both in deposition and at trial that the reason for ordering the decedent's arrest as well as writing the judge the note was to attempt to keep Mr. Robinson off the street for as long as possible. The success of this effort is most readily apparent.

First, the decedent was arrested and charged with having violated a township ordinance, a misdemeanor offense. He was arrested on a Saturday, thus no judge or magistrate was available for immediate arraignment. Defendants Bailey and Tarpening ignored a Michigan Statutory provision, which required them under those circumstances to either release the decedent on his own recognizance or to set a bond, not to exceed $100.00 (MCLA 780.581). No bond was set and decedent was not otherwise released, of course, because the defendants had made a decision to keep the decedent off of the street, regardless of the law, which dictated otherwise.

Secondly, the District Court Judge conducted a pretextual arraignment of the decedent. In his deposition and trial testimony. the judge conceded that an arraignment was not merely ceremonial, but rather is intended to apprise the criminal defendant of the nature and consequences of the crime with which he is charged, and to elicit a knowing and voluntary plea from that defendant. The judge went on to admit that the purposes of an arraignment are not fulfilled when it is clear that the defendant does not understand what is happening during the hearing.

After eliciting this portion of the judge's testimony, the lower Court received a copy of the transcript of the decedent's arraignment into evidence. The most cursory review of the transcript reveals that the decedent was confused, disoriented and incoherent, totally unaware of where he was, why he was there, or who was addressing him. Despite the fact that the decedent was clearly incapable of understand-

ing the nature of the proceedings, and was further obviously incapable of tending to his personal needs, the judge entered a plea of not guilty for him and set bond at $1,000.00 cash or surety.

Although decedent's home address and telephone number was available, the Court made no attempt, nor did it direct the arresting officer to attempt to reach any family members of this undeniably helpless man.

The third indication of a successful conspiracy is found in the bond set by the Court. The bond was not only grossly excessive, it was also set contrary to law.

The maximum fine for violation of the ordinance, as the decedent was charged was $500.00. Jail time was also a possible penalty upon conviction. Pursuant to MCLA 600.872 bond could be set at double the maximum fine only when the maximum penalty is a fine only. Since jail time was a possible penalty, it was impermissible to set bond in excess of the maximum possible fine amount.

More significantly, however, is the fact that the bond was $1,000.00 cash or surety. Pursuant to the Michigan District Court Rules (DCR 790), any bond set in a misdemeanor prosecution requires only 10% of the bond to be posted in order to gain release from jail. This deviation from the statute reflects an affirmative intent to accede to the wishes of the defendants, being to keep the decedent locked up for as long as possible. In further support of this theory, Plaintiff subpoenaed every court file assigned to the District Court Judge who handled the Robinson prosecution, within 30 days before or after the decedent's arraignment. Nineteen files were produced. Plaintiff offered those files into evidence, but the trial Court refused to admit them. The files reflected, however, that bond in 18 of the files was set at $100.00/10% (thus releasing those defendants upon posting $10.00), and one file in which bond was set at $500.00/10% ($50.00 posted for release).

Clearly, bond having been set at $1,000.00 cash or surety in the decedent's case represented a deviation from the law and the judge's usual practice. This deviation, we submit, is directly related to the conspiratorial efforts of the defendants. Indeed, if not protected by absolute immunity from suit, the judge would have been named as a defendant in this action, with respect to the allegations of conspiracy.

Fourth, the Michigan General Court Rules provides that a misdemeanor defendant, unable to post bond while awaiting trial, must be released from jail on his own recognizance after 30 days' incarceration. (GCR 789.2) Although the Court conducted no less than three hearings related to the decedent following the expiration of the thirty day period, he was never released.

The fifth indication of the impact of a conspiracy is the fact that the decedent was incarcerated without trial for 137 days. The maximum jail time permitted by the ordinance was 90 days. Thus, the decedent was incarcerated for 47 days longer than permitted by law, had he been convicted, while he still enjoyed the presumption of innocence. The Court conducted at least one hearing related to the decedent's case during the 47 day period beyond the maximum penalty, but nonetheless failed to order him released. No attempt was ever made to set a trial date. No attempt was ever made to reduce the decedent's bond. No attempt was ever made to seek medical assistance for a man obviously incapable of helping himself.

Indeed, had the decedent not become critically ill, which resulted in his transfer from jail to a nearby hospital, there is no way of knowing how much longer he would have remained in jail while awaiting a trial.

In addition to the circumstantial evidence which indicated that the District Court Judge acted to delay the decedent's release, as requested in the Bailey note, there are other indications of the conspiratorial effort to preclude his release.

After Mr. Robinson failed to return home on the evening of May 24, 1980, his wife, the Petitioner herein, became alarmed and contacted several police agencies in an effort to locate her husband. This included numerous calls to the Waterford Police Department and the Oakland County Sheriff's Department which operated the Oakland County Jail. Each time contacted, officers with these departments denied any knowledge of the decedent or his whereabouts. These denials were forthcoming despite the fact that both agencies had records which reflected Robinson's arrest and his incarceration at the Oakland County Jail. Clearly, by denying any knowledge of his whereabouts, the decedent's family members were foreclosed from making any effort to obtain his release.

Mrs. Robinson did not learn of her husband's whereabouts for approximately five weeks after his arrest. She was informed of his detention by the minister of her church after he saw Robinson during an unrelated visit to the jail.

This action was commenced on May 6, 1982. The Complaint, insofar as it is pertinent to the cross-petitioners hereto, alleged causes of action under 42 USC § 1983 for the unlawful arrest, imprisonment and prosecution of the decedent in violation of his rights protected by the fourth, fifth, and fourteenth amendments to the United States Constitution, their deliberate indifference to the obvious medical needs of the decedent in violation of his fifth and fourteenth amendment rights and a conspiracy on the part of the individual respondents to deprive the decedent of his right to a speedy trial before a fair and impartial tribunal.

Several state law claims, which for the most part, correspond to the claimed constitutional torts were also alleged.

The Respondent also alleged claims against the Township of Waterford under § 1983. In addition to claims for failure to properly train, supervise and discipline, she also challenged the constitutionality of Section 5.3 of the Waterford

Ordinance. Respondent now seeks certiorari in her presently pending petition on these and other claims.

On September 23, 1983, the trial court entered its order granting the Defendant Township's Motion for Partial Summary Judgment and denying the Plaintiff's Motion for Partial Summary Judgment. These cross motions addressed the constitutionality of the ordinance.

On December 22, 1983, the trial court entered its order granting in part and denying in part the Motion for Directed Verdict brought on behalf of the Defendants Tarpening and Bailey. Insofar as the motion was granted, the Court directed a verdict in favor of these defendants on the allegation of conspiracy and on the allegation of the deliberate indifference to the decedent's medical needs, and Plaintiff's claim for malicious prosecution.

With respect to the directed verdict on the issue of malicious prosecution, the Court accepted the Defendants' argument that under Michigan decisions, malicious prosecution claims were precluded without a disposition on the merits of the criminal case in favor of the accused. There was never any disposition on the merits of the decedent's criminal case as it remained pending at the time of his death. This doctrine has been fashioned by the Michigan Courts, clearly in an effort to prevent malicious prosecution claims by criminal defendants who avoid trials as a result of procedural rulings which require dismissals, but do not address the issue of guilt or innocence. The Michigan Statute which creates a cause of action for malicious prosecution, imposes no such limitation on the availability of the action to a criminal defendant. (See MCLA 600.2907)

By accepting these arguments, the trial court rejected Plaintiff's arguments that the Michigan Courts, in fashioning the doctrine, had not envisioned a scenario where there was no disposition at all in the underlying criminal action due to the affirmative and successful efforts of the arresting

officers to delay the progress of the prosecution and maintain custody of the accused throughout its pendency.

On appeal, the Court of Appeals declined to address the merits of this argument by simply stating that a federal court was not a proper forum in which to seek an exception to a longstanding state law doctrine. This issue is raised in the Plaintiff's (respondent hereto) petition for certiorari presently pending before this Honorable Court.

On January 11, 1984, the Court entered its Judgment on the Verdict which adopted the jury's verdict of no cause of action as it relates to the claims against Defendants Tarpening and Bailey.

The Court of Appeals affirmed the holding relative to the constitutionality of the ordinance, the judgment of no cause of action in favor of Tarpening and Bailey on the issues of the arrest, imprisonment and prosecution of the decedent, but reversed the directed verdict on the issue of conspiracy.

The Court of Appeals also reversed the grant of attorney fees under 42 US § 1988 in favor of the Defendants Township, Donlin and Bedell.

The Court denied cross motions for rehearing.

On October 23, 1989 Plaintiff filed her petition for certiorari which is now pending in this Honorable Court.

On November 22, 1989, these Defendants filed the instant cross-petition for certiorari.

THE REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I.

CERTIORARI SHOULD NOT BE GRANTED BECAUSE IT IS NOT INCONSISTENT WITH THE FACTS OF THIS CASE FOR PLAINTIFF (RESPONDENT) TO PREVAIL ON THIS CLAIM EVEN IF THE VERDICTS IN FAVOR OF THE DEFENDANT WERE LEFT UNDISTURBED

Although it is true that Plaintiff has always contended that the arrest and imprisonment of the decedent was illegal, and that the conspiracy of the defendants began with the arrest, it does not follow, as the defendants urge, that with the jury's finding that there was no illegal arrest or imprisonment and the Court's decision to direct a verdict on the malicious prosecution claim, that no cognizable right exists for which the conspiracy may relate. To the contrary, several rights of the decedent were violated as a result of the conspiracy, and those rights are entirely independent of any claims which challenge the legality of the arrest and imprisonment or the malicious intent in the commencement of criminal proceedings.

We need go no further than the admitted intent of Defendant Bailey in writing the note to the District Court Judge. At trial, Defendant Bailey was questioned about his reasons for writing a note to the District Court Judge. We find the following at page 26 of the transcript:

> Q: And the purpose for that communication (the note) was to make sure that once you had gotten Mr. Robinson off the street, that he was off for as long as he could possibly be off the street; isn't that correct?
>
> A: Yes, sir.

It is clear that Defendant Bailey was eliciting support from the judge in his effort to maintain custody of the decedent

for as long as possible. It is evident that this effort was successful, and equally evident that a number of the decedent's rights were deprived of him in the process.

The Eighth Amendment to the Constitution prohibits excessive bail. Yet we submit that given the nature of the offense, the Michigan statutory provisions governing bail for misdemeanor offenses (MCLA 780.581 and 600.872), and the District Court Judge's usual practice, the bond set in this matter was excessive and contrary to law. A jury could readily find that a conspiracy existed between the defendants and the judge to utilize every means available to unlawfully prolong the decedent's incarceration. The jury could also find that the bond amount set by the Judge was excessive and in furtherance of this conspiratorial goal. These findings, if made, do not go to the issue of the propriety of the arrest or imprisonment, but rather to rights secured by the Constitution, regardless of that issue.

Similarly, the continued retention of the decedent beyond 30 days, contrary to Michigan law and then beyond 90 days, also contrary to Michigan law as well as the Township Ordinance, was a denial of due process which is protected by the Fifth Amendment. A jury could find that this violation of the decedent's rights was in furtherance of the conspiracy, and this finding would be independent of the issue of the propriety of the arrest and imprisonment.

Likewise, the Sixth Amendment guarantees all accused a right to a speedy trial. As previously stated, no trial date was set at any time during or after the decedent's 137 day stay at the Oakland County Jail. A jury could easily find that this delay, while custody was maintained was in furtherance of the conspiracy and the right abridged would not be affected one way or the other by the question of the propriety of the offense.

Fundamental to any consideration of Fifth Amendment due process, is its guarantee that an accused will be brought before a fair and impartial tribunal. Defendants obviously

sought to circumvent this protection when they attempted to influence the presiding judge in an ex-parte communication. This effort appears to have been successful and clearly within a jury's province to so find. If found, this too would not depend upon the legality of the arrest.

Consequently, we do not quarrel with the cross-petitioners when they state that a claim for conspiracy under 42 USC § 1983 is actionable only if accompanied by a claim of an actual deprivation of rights.

Instead, we submit that totally independent of the claims of false arrest and imprisonment, the decedent suffered Constitutional deprivations as a result of the conspiracy on the part of the defendants.

Thus, we submit that the Court of Appeals did not misapprehend the consequence of its decision when it remanded the matter for trial on the issue of conspiracy, even though it declined to reverse the verdict on the issues of illegal arrest, imprisonment and the directed verdict on the issue of malicious prosecution. Moreover, we pray that our petition for certiorari will be granted permitting review of these claims on which the Plaintiff did not prevail.

II

CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE CROSS-PETITIONERS HAVE FAILED TO DEMONSTRATE A CONFLICT AMONG THE CIRCUITS ON THE ISSUE OF CONSPIRACY UNDER 42 USC § 1983

Despite framing the issue in its brief as being one in which the circuits are in conflict, the cross-petitioners have failed to demonstrate such a conflict. Consequently, we submit that the cross-petition should be denied.

CONCLUSION

For the foregoing reasons, we submit that the cross-petition for certiorari should be denied.

Respectfully submitted,
ERNEST L. JARRETT, P.C.

By: /s/ ERNEST L. JARRETT

Attorneys for Petitioner
2515 Cadillac Tower
Detroit, Michigan 48226
(313) 964-2002

HATCHETT, DEWALT, HATCHETT & HALL
By: /s/ ELBERT L. HATCHETT

485 Orchard Lake Road
Pontiac, Michigan 48053
(313) 334-1587